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SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

2011 JUL 29 PM 2:50

SANDRA K. HARRIS, CLERK  
BY: Ivy Rios ✓

5  
6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

7 **IN AND FOR THE COUNTY OF YAVAPAI**

8 **STATE OF ARIZONA,**

9 Plaintiff,

10 vs.

11 **STEVEN CARROLL DEMOCKER,**

12 Defendant.

**CAUSE NO. P1300CR201001325**

**STATE'S MOTION FOR  
ADMISSIBLE EVIDENCE**

Assigned to Hon. Warren R. Darrow  
Division PTB

14 The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and  
15 her deputy undersigned hereby submits its Motion to Admit Evidence.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 The State proposes that any evidence ordered precluded by the court in P1300CR2008339  
18 (case #1) due to late disclosure is now moot under P1300CR201001325 (case #2). This Court,  
19 pursuant to an agreement by counsel, has set the current disclosure deadline for August 8, 2011  
20 pursuant to Rule 15.6 A.R.C.P. unlike in the previous case when the court set an arbitrary disclosure  
21 deadline approximately a year before the start of the trial. Prior preclusion orders are not in effect  
22 under the present case disclosure deadline of August 8, 2011.

24 //

25 //

26 //

1           1.     UBS Emails

2                     To the extent that the Court precluded emails based on relevance the State asserts  
3 there was a financial motive for the killing. Therefore, the relevant emails are evidence of his motive  
4 and probative of his guilt.

5           2.     Jennifer Rydzewski

6                     The task email was sent by the Defendant to Ms. Rydzewski on the day Carol  
7 Kennedy was killed. In the task request dated July 2, 2008, Defendant, told Ms. Rydzewski to close a  
8 join UBS account held by the Defendant and the victim.

9                     The State asserts that the task email is probative of the Defendant's motive and guilt.  
10 In addition, it established a time line for the Defendant's activities on the day of the homicide.

11           3.     Sorenson Testing for DNA from Defendant's bicycle

12                     The Sorenson testing corroborates the AZDPS crime lab findings. At issue is the  
13 consumption of the swab used in the testing of the bicycle with the added result that the Defense  
14 could not test the swab. The State asserts that the lack of testing and consumption of the swab goes  
15 to the weight of the evidence and not the admissibility.

16                     Since the Defense would have an opportunity to cross examine the State's witness  
17 preclusion of the testing is not the remedy. Additionally, the bike can still be re-tested by the defense  
18 if they so choose to do so. Should the Court find a remedy is necessary then the only proper remedy  
19 is a Willits instruction, not preclusion of the evidence.

20           4.     Communication by Defendant before, during and after the Homicide

21                     The Court's rulings in the 2008 homicide case regarding the Defendant's cell phone  
22 use before, during and after the homicide are admissible under Rules 401, 402 and 406. Defendant's  
23 use of his cell phone provides a timeline for events in the case including communications with the  
24

1 victim, Carol Kennedy. The State has retained an expert who will testify about the Defendant's  
2 routine pattern for using his cell phone and how this routine pattern was not adhered to before,  
3 during and after the homicide.

4 Evidence of the Defendant's cell phone usage is relative and admissible. The  
5 evidence is probative of the Defendant's guilt.

6  
7 5. Statements of Barb O'Non

8 In case #1 the court precluded statements from Ms. O'Non for lack of foundation and  
9 also found that the statements were unduly prejudicial.

10 1. **\$1 million in debt:** the Defendant told Ms. O'Non that he was \$1 million in  
11 debt. The State will provide foundation from the testimony of Ms. O'Non. The Defendant's  
12 statement that he was \$1 million in debt will be corroborated by a copy of the credit report that the  
13 Defendant requested in May 2008. Richard Echols, the State's Forensic Financial expert will provide  
14 testimony that the Defendant was in dire financial straits on July 2, 2008 and unable to meet his  
15 financial obligations.

16 This statement is not unduly prejudicial. The State will show that the Defendant had a **strong**  
17 financial motive to kill Carol Kennedy.

18  
19 2. **Wishing Carol dead:** Statements that the Defendant wished his ex-wife, the  
20 victim, dead supports the State's theory of financial motive. **In 2007 when these statements were**  
21 **made the Defendant knew his financial situation was worsening.** The Defendant knew that the  
22 only way out of his deep financial hole would be the death of the victim, his ex-wife Carol Kennedy.

23 These statements are probative of the Defendant's guilt and are not prejudicial.

24  
25 3. **Carol's death was an accident:** At the time the Defendant made these  
26 statements to Barb O'Non he knew that Carol Kennedy had been murdered and that her death was

1 not an accident. The Defendant spoke with Ms. O'Non the day after the murder. YCSO informed  
2 the Defendant on the night of the murder that the death of his ex-wife was being looked at as a  
3 "suspicious death."

4 These statements are probative that the Defendant is a liar and goes to the credibility of the  
5 Defendant. These statements are probative of the Defendant's guilt and are not prejudicial.

6  
7 **4. Multiple Marriage Proposals:** The Defendant proposed marriage to Barb O'Non on  
8 multiple occasions. Two of the proposals came during the time between the murder of Carol  
9 Kennedy and the Defendant's arrest. The first marriage proposal was made within one week of  
10 Carol's murder and after the Defendant told detectives that he and Carol, just days before her death  
11 were thinking of reconciling. The second proposal occurred a few days before the Defendant's arrest.  
12 These marriage proposals also came at a time when the Defendant was in intimate relationships with  
13 at least two other women: Renee Girard and Laurie Spira.

14  
15 These statements are probative that the Defendant is a liar and goes to the credibility  
16 of the Defendant.

#### 17 **LEGAL ARGUMENT**

18 *State v Whelan*, 208 Ariz. 168, 91 P.3d 1011, (2004) is the applicable authority to the facts  
19 and circumstances of this case. In *Whalen* the defendant was arrested for DUI with license  
20 suspended (count I) and DUI with a BAC of 0.10 or more within two hours of driving (count II).  
21 Defendant filed a motion to suppress the blood results because the medical assistant, a phlebotomist  
22 was not a "qualified person" under Arizona law at that time. The trial court granted defendant's  
23 motion to suppress and the State filed a motion to dismiss the case without prejudice. The order of  
24 dismissal was not appealed. Subsequently, a higher Arizona court held a phlebotomist fit the  
25 definition of a qualified person. Based on this ruling the State refiled the same two counts against  
26

1 the defendant in the second case. The defendant filed a motion to dismiss count 2 and again moved  
2 to suppress the evidence claiming the second trial judge was bound by the previous ruling of the first  
3 trial judge. The case went to trial and defendant was convicted on count 1 and acquitted on count 2.  
4 Both parties appealed.

5  
6 On appeal defendant claimed the second trial judge erred by denying his motion to dismiss  
7 count 2 and the denial of his motion to suppression the evidence. Defendant claimed that res  
8 judicata, law of the case and Rule 16.1(d) precluded the second trial judge from reversing the first  
9 trial judge.

10 Whelan held that "Rule 16.1(d), like the law of the case doctrine, is procedural and applies to  
11 setting of the *same* case. As Rule 16.1(d) expressly provides, '[t]his rule shall govern the procedure  
12 to be followed in cases between *arraignment and trial*.'" Emphasis added by the *Whelan* court at  
13 page 171.

14  
15 The question before the *Whelan* court,

16 "is not whether the law of the case doctrine or Rule 16.1(d) precludes reconsideration but  
17 whether the principles of res judicata and more specifically, the subsidiary doctrine of  
18 *collateral estoppel* (or "issue preclusion") precludes the trial court from considering afresh,  
in a subsequent proceeding, the suppression order entered in the earlier proceeding.

19 *Whelan* at page 171.

20 *Whelan* unequivocally stated this issue does not implicate Rule 16.1(d) or the doctrine of the  
21 law of the case. "The law of the case concerns the practice of refusing to open questions previously  
22 decided in the *same* case by the same court or a higher court. *Davis v Davis*, 195 Ariz. 158, 162, 985  
23 P.2d 950, 952 (App. 1999). The emphasis on "same case" was placed by the *Whelan* court. The  
24 *Whelan* court concluded the law of collateral estoppel precludes the trial court from considering  
anew in a subsequent proceeding, an order entered in an earlier proceeding.

25 The *Whelan* court, citing from *State v Jimenez*, 130 Ariz. 138, 140, 634 P.2d 950, 952 (1981)  
26 noted, "[t]he traditional elements of collateral estoppel are: [1] the issue sought to be re-litigated  
must be precisely the same as the issue in the previous litigation; [2] a final decision on the issue

1 must have been necessary for the judgment in the prior litigation; [and][3] there must be mutuality of  
2 parties.”

3 Element one’s “precisely the same” test cannot be met in this case. The numerous rulings in  
4 CR20081339 are not precisely the same in Case #3 as in case #1. The difference in the type and  
5 number of charges contained in two separate indictments are precisely not the same. It would be a  
6 mistake of law to apply the law of the case and Rule 16.1(d) in this analysis.

7 Case #1 was a First degree murder and Armed Burglary case. Pretrial rulings in case #1  
8 resulted in the suppression of the State’s evidence based upon “alleged” late disclosure. Under  
9 element one, the issues at hand are not “precisely the same” as case #1 because of the additional 8  
10 charges in a separate case, the suppressed evidence can no longer be claimed to be “late” and the  
11 State, at defendant’s recommendation, was ordered by this court to dismiss case #1.

12 Under element two of the collateral estoppel analysis, the pretrial rulings in case #1 were not  
13 final decisions necessary for the judgment in that litigation”. *Jimenez*, supra at 150. This is because  
14 the rulings were interlocutory and not final orders. *State v Rodriguez*, 126 Ariz. 28, 30, 612 P.2d  
15 484, 486 (1980) equated a motion *in limine* with a motion to suppress under Rule 16, Ariz. R. Crim.  
16 P. In *Rodriguez*, the motion was meant to preclude the State from introducing the defendant’s  
17 juvenile record. The orders in case #1 precluding the State’s evidence based upon a finding they  
18 were lately disclosed equates to a motion to suppress. According to Black’s 8<sup>th</sup> edition an  
19 interlocutory appeal is an appeal that occurs before the trial court’s final ruling on the entire case. In  
20 a mistrial, there are no final decisions on the merits entered in for collateral estoppel to apply.  
21 *Garcia v. General Motors Corp.*, 195 Ariz. 510, 514, 990 P.2d 1069, 1073 (1999).

22 If collateral estoppel does not apply to the facts in this case, then the same analysis can be  
23 made under the good cause exception in Rule 16.1(d). Good cause exceptions that apply to this  
24 analysis include: 1) all rulings in case#1 dealt with the charges of First Degree Murder and Armed  
25 Burglary; 2 ) case #3 contains 7 additional felonies and 1 misdemeanor charged by separate  
26 indictment; 3) trial judge #1 suppressed the majority of the State’s evidence based primarily on  
untimely disclosure after the court imposed an arbitrary discovery cut-off date in July, 2009 for a  
trial scheduled to start in June, 2010; 4) the disclosure cut-off date in case #3, by stipulation of the  
parties and order of trial judge #2 is August 7, 2011; 5) trial judge #1 ruled certain witnesses could  
not to be called to testify who are now material witnesses in case #3 pertaining to the hiding of the  
golf club cover, anonymous email, voice in the vent, Hartford Insurance monies and forgery charges.

1 The State reserves the right to add to this list of good cause as further motions relating to the  
2 admissibility evidence in case #3 becomes apparent.

3 *State v King*, 180 Ariz. 268, 883 P.2d 1024, (1984) supports the State's case if this court  
4 decides the law of the case and Rule 16.1(d) apply. In *King*, the first trial judge barred the  
5 introduction of testimony under Rule 702, Ariz. R. Crim. P. Trial judge #2 overruled this decision  
6 pursuant to Rule 16.1(d), Ariz. R. Crim. P. utilizing the "good cause" exception. The singular good  
7 cause exception in *King* was a finding by trial judge #2 that the testimony was admissible under Rule  
8 701. In other words the factual testimony was exactly the same except the testimony was admitted  
9 under a different rule of criminal procedure. *King* is distinguished from the instant case by the fact  
10 that the overruled decision occurred in the *same* case, making the analysis under procedural Rule  
11 16.1(d) applicable. *King* affirmed the good cause exception by stating the court's discretion to  
12 reconsider an earlier ruling is reflected in Rule 16.1(d). *King*, quoting *Love v Farmers Ins. Group*  
13 121 Ariz. 71, 73, 588 P.2d 364, 366 (App. 1978) agreed that "a court does not lack the power to  
14 change a ruling simply because it ruled on the question at an earlier stage."

15 The analysis of the *Whelan* decision would be incomplete without discussing Arizona's  
16 adopted exception to the collateral estoppel doctrine under The Restatement (Second) Judgments,  
17 section 28(2)(b). *Whelan* at 172, *supra*.

18 The Restatement (Second) of Judgments, section 28(2)(b) provides:

19 "where an issue is actually litigated and determined by a valid and final judgment and the  
20 determination is essential to the judgment, relitigation of the issue in a subsequent action  
21 between the parties is not precluded if: *a new determination is warranted in order to take*  
22 *account of an intervening change in the applicable legal context.*"

23 Emphasis added.

24 The intervening change in the applicable legal context are additional facts in case #3 that  
25 were not present at the beginning of case #1. These intervening facts resulted in 7 additional felonies  
26 and 1 misdemeanor offense occurring after the defendant was arrested, indicted and placed in  
custody on the first degree murder charge in case#1. The intervening change in the applicable legal  
context are the facts that are inextricably intertwined with the murder of Carol Kennedy but arose  
during the pendency of the first case. The intervening change in the legal context in case #3 allows  
for a re-determination of the rulings in case #1 on its own grounds. The section 28(2)(b) exception to  
the collateral estoppel doctrine has been expressly followed in Arizona in *Irby Construction Co. v.*

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1 *Arizona Dept. of Revenue*, 184 Ariz. 105, 109, 907 P.2d 74, 78 (App. 1995). *Irby* stated that "a new  
2 determination" is warranted.

3 The dissent in *Whelan* relied upon *State v Nahee*, 155 Ariz. 115, 745 P.2d 173. The majority  
4 distinguished *Nahee* noting the order at issue in that case was a dismissal and not an interlocutory  
5 order; secondly there was **no intervening change in facts** or law; and thirdly, the dissent  
6 acknowledges that the brief reference to law of the case in *Nahee* appears to be dicta. *Whelan* at 174,  
7 supra.

### 8 CONCLUSION

9 The present case encompasses all of the charges previously filed on the defendant as well as  
10 new additional charges. Based on the Law of the case, Rule 16.d should not be a reason to uphold  
11 prior rulings. With the filing of the new and present case issues of admissibility should be addressed  
12 without the rulings of the prior court having an influence on this Court.

13  
14  
15 RESPECTFULLY SUBMITTED this 29 day of July, 2011.

16  
17 Sheila Sullivan Polk  
18 YAVAPAI COUNTY ATTORNEY

19 By: Steven A. Young  
20 Steven A. Young  
21 Deputy County Attorney

22 COPY of the foregoing Emailed this  
23 29th day of July, 2011, to:

24 Honorable Warren R. Darrow  
25 Division PTB  
26 Yavapai County Superior Court

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